

## STATE OF RHODE ISLAND

## COMMISSIONER OF EDUCATION

**E. DOE****v.****WEST WARWICK SCHOOL DEPARTMENT****RULING ON REQUEST FOR INTERIM ORDER**

This matter concerns a request for an interim order directing that Student Doe “stay put” in his current educational placement.<sup>1</sup>

Student Doe is 9 years old. While attending Johnston public schools in December 2014, an individualized education program (IEP) was developed for him. The IEP provided for instruction in a regular classroom with consultations with a special education teacher and a social worker.

In the spring of 2015, Doe experienced serious behavioral issues. With the consent of his parents, the Johnston School Department placed Doe in a private special education day program in Providence. Doe was educated in a small, self-contained classroom and provided individual and group therapeutic services. There is no evidence in the record that Doe’s IEP was revised at the time of or after this placement.

Doe recently became a resident of West Warwick. On August 20, 2015, West Warwick special education staff observed Doe at the private program for an hour. An IEP meeting was held the same day. It was determined at the IEP meeting that Doe needs to receive academic instruction “in a small, highly-structured therapeutic classroom where clear behavioral expectations are defined and reinforced, with immediate feedback and follow-thru. Behavior will be monitored throughout the day.” [Joint Exhibit 2]. The proposed IEP notes that Doe “requires a highly-structured, therapeutic environment with a low student-teacher ratio outside of the general educational setting.” [*Ibid.*] The IEP also provides for individual and group clinical/behavioral services.<sup>2</sup>

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<sup>1</sup> The request was received on August 27, 2015. A hearing was conducted on September 3, 2015.

<sup>2</sup> Doe’s academics are on grade level.

West Warwick has determined that the IEP can be implemented in an alternative program at a district elementary school, which would be the least restrictive environment for Doe. Arrangements were made for Doe's parents and a special educator from the private program to visit the district's alternative program. Doe's parents did not visit the West Warwick program. Doe's mother filed for mediation under Board of Education's Regulations Governing the Education of Children with Disabilities. Doe's father filed this interim-order request asking that Doe "stay put" in the private day program in Providence.

Rhode Island General Law 16-39-3.2, entitled "Interim Protective Order," states in part that

In all cases concerning children, other than cases arising solely under §16-2-17,<sup>3</sup> the commissioner of elementary and secondary education shall also have power to issue any interim orders pending a hearing as may be needed to ensure that a child receives education in accordance with applicable state and federal laws and regulations during the pendency of the matter.

Section 300.518(a) of the Board of Education's Regulations Governing the Education of Children with Disabilities states that in this type of case

. . . during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

Rhode Island General Law 16-24-1(e) states that "[i]n those cases that an individual education plan has been adopted for a child and the child moves to another town or city, the plan shall remain in effect until a new plan is adopted for the child in the new town or city."

The West Warwick School Department contests the Commissioner's jurisdiction over this interim-order request. It points to the absence of a special education due process complaint pursuant to §300.518(a), and it contends that this matter must be resolved under the impartial due process hearing system, in which employees of the state educational agency, i.e., those in the Commissioner's office, may not serve as hearing officer.

As previously noted, this dispute is currently in the mediation stage of the special education conflict resolution procedure, not due process. Section 300.518(a) therefore does not

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<sup>3</sup> R.I.G.L. 16-2-17 concerns student discipline for violation of school regulations.

apply at this time. However, Rhode Island General Law 16-24-1(e) provides an alternative right to “stay put” and it does not require the filing of a due process complaint. As the Rhode Island Supreme Court stated in a 1985 decision regarding special education students’ access to the dispute resolution provisions of chapter 39 of title 16:

A careful examination of §1415 [of the Individuals with Disabilities Education Act] reveals that the requirements enunciated therein establish merely a bare minimum of protective safeguards. This interpretation of the statute is mandated by the language “shall include, but shall not be limited to” appearing at the beginning of §1415. Congress clearly contemplated a certain amount of flexibility for the states in meeting the requirements of the act, provided the state protections afforded handicapped children do not fall below the level set by Congress. It is axiomatic that a state may therefore provide greater protections without running afoul of the federal framework.

The Rhode Island statutory scheme in issue here affords the handicapped child and his or her parents greater protection than the act requires. It also embodies an important public-policy decision that the resolution of most education-related controversies in this state is best accomplished by a three-level process. Certainly the federal act never anticipated that handicapped children would be denied the rights enjoyed by nonhandicapped children under state law. . . .<sup>4</sup>

Rhode Island General Law 16-39-3.2 provides for the issuance of interim orders to ensure that all children, non-disabled and disabled, receive education in accordance with state and federal laws while a dispute is pending. Student Doe, who has moved to a different town, has the right to maintain his educational placement pursuant to R.I.G.L. 16-24-1(e) until a new IEP is adopted.<sup>5</sup> Doe, as a disabled child, may invoke §16-39-3.2 to enforce this statutory right just as any non-disabled child may invoke the interim-order provision to enforce another state or federal law or regulation. The special education due process system supplements a disabled child’s rights under Rhode Island General Laws. It does not replace them.<sup>6</sup>

With the jurisdiction issue settled, it is necessary to determine Doe’s last agreed-upon educational placement at the time the request herein was filed and whether the IEP proposed by the West Warwick is, in fact, a change in Doe’s educational placement.

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<sup>4</sup> *In re Michael C. and the Coventry School Department et al.*, 487 F.2d 495 (1985).

<sup>5</sup> We take the word “adopted” to mean “agreed-upon” or “implemented,” not “proposed.”

<sup>6</sup> Because this is not an impartial due process hearing triggered by a special education due process complaint, §300.511(c)’s prohibition of state employees acting as hearing officers does not apply. Also see *Department of Children, Youth and Families v. Foster-Glocester Regional School District/Rhode Island Department of Education*, Commissioner’s decision 009-14, July 7, 2014, footnote 7.

An "educational placement" under the Individuals with Disabilities Act is not a place or location, but a program of services from which the child can obtain some educational benefit.<sup>7</sup> See *Lunceford v. District of Columbia Board of Education*, 745 F.2d 1577 (D.C.Cir.1984). In that case, a change in a feeding schedule that would occur with transfer of severely disabled young adult from a private hospital to a public institution was held to be insufficient to constitute a change in educational placement. We quoted from the *Lunceford* decision in the 1996 stay-put interim-order case of *In the Matter of Jane A.P. Doe*, stating that "a party 'must identify, at a minimum, a fundamental change in, or elimination of a basic element of, the education program in order for the change to qualify as a change in educational placement.'"<sup>8</sup>

We do not have an IEP document that reflects the agreed-upon placement at the private special education program. The December 2014 Johnston IEP for Doe certainly does not describe this placement. Instead, we have a *de facto* placement.

At the hearing, Doe's parent testified that Doe has shown great improvement at the private program, he is doing extremely well there academically and socially, he has difficulty with transitions and it is not in his best interest to be moved from the program at this time. The parent did not show how the West Warwick proposed IEP fundamentally changes Doe's program or eliminates a basic element of it. The West Warwick special education director, who took part in the observation of Doe and the IEP meeting on August 20th, testified that Doe's goals can be met, his services provided and his behaviors accommodated by the educators and clinical team at the special program in the district elementary school. Based on the evidence in the record, we do not find that the West Warwick proposed IEP changes Doe's educational placement for purposes of "stay-put." We therefore deny the request for an interim order keeping Doe at the private program. At this time, Doe's public-school enrollment must be fulfilled at the West Warwick elementary school in accordance with the IEP developed on August 20th.

We will, however, continue this matter for further hearing about Doe's placement if so requested by his parents. It is our hope that the parents will visit the West Warwick school program and complete the mediation process. We further hope that if those measures are taken in a collaborative manner, and the parents and the staff at the school work together to recreate the

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<sup>7</sup> Under prevailing law, the placement need not provide the "best" education for the child.

<sup>8</sup> Commissioner's decision of November 14, 1996, p. 4, quoting *Lunceford* at page 1582.

environment that served Doe so well in the private program, Doe will have a successful transition.<sup>9</sup> If issues arise which cause Doe's parents to question the appropriateness of this placement, they may file a special education due process complaint or, consistent with *In re Michael C.*, take these issues to the West Warwick School Committee and, if necessary, present them in further proceedings herein.

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Paul E. Pontarelli  
Hearing Officer

Approved:

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Ken Wagner  
Commissioner of Education

Date: September 11, 2015

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<sup>9</sup> This includes a rocking chair for Doe, as noted by the special education director at the hearing.